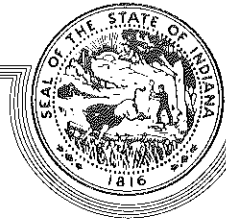


STATE OF INDIANA

DEPARTMENT OF REVENUE
OFFICE OF THE COMMISSIONER
INDIANA GOVERNMENT CENTER NORTH
100 NORTH SENATE AVENUE, ROOM N248



INDIANAPOLIS, 46204-2253

October 21, 2013

Craig Johnson
Executive Director
Streamlined Sales Tax Governing Board
100 Majestic Drive, Suite 400
Westby, WI 54667

Dear Craig:

This letter is in response to the memorandum concerning the preliminary report on 2013 annual recertification for Indiana.

The report requires responses to comments related to the Taxability Matrix and Certificate of Compliance.

Report Comment: The Federal Manufacturer's Tax and Federal Retailer's Excise Tax are exempt from the sales tax.

Response: The cited statute exempts "retailer's excise tax imposed by the United States," and "manufacturer's excise tax imposed by the United States" on specified categories of vehicles and other tangible personal property if either collected or stated separately.

Indiana amended IC § 6-2.5-4-1(f)—effective July 1, 2014—eliminating the exclusion of federal and state excise taxes from the sales price of gasoline. The Department acknowledges and recognizes, however, a need to examine its exclusion of certain excise taxes from the calculation of sales tax on transactions involving special fuel; and from the calculation of sales price on specified categories of vehicles and other tangible personal property.

Report Comment: Indiana was declared out of compliance because the rounding rule does not address allowing sellers to elect to compute tax on an item or invoice basis.

Response: The Department cited the rounding rule for this Section; however, that statute does not include a provision that allows the seller to elect to compute the tax due based on an item or invoice basis. The statute requires the tax to be based on the gross retail income of the transaction. The Department expresses concerns that a fact pattern allowing a seller to compute the tax due on an item by item basis could result in significant tax evasion if a seller prices each individual item less than the threshold for the state to impose tax, but the sale of several items based on an invoice would result in the proper amount of tax due. For example, seller taxes on an item basis and sells 1,000,000 nails to a home builder, but sells them for \$.04 each. If sold on an item basis there would not be any sales tax collected, but if sold on an invoice basis, there would be \$2,800 in sales tax due.

During CRIC's compliance review in 2012, Indiana noted that more than one CRIC member acknowledged that, while Indiana presents a rare situation, Indiana also presents a scenario worthy of further attention. Indiana requests any guidelines that CRIC or the Governing Board can provide, as well as any first-hand, or anecdotal, accounts offered by other Member States in response to such item-by-item or invoice-by-invoice bases.

Report Comment: Accepting a SER from a Model 4 seller.

Response: The Indiana Department of Revenue has embarked on a major software and data collection archive upgrade in 2013 to expand its electronic filing capabilities and administration for more of Indiana's listed taxes. These asset acquisitions and procedural advancements enable the Department to accept and process more returns, payments, and refunds. SER form adjustments remain an integral part of the upgrade project and the Department's continuing objectives in making sales tax filing and remitting as easy and efficient for taxpayers as possible. But the project also presents a timing challenge with respect to the Department's resolution of Model 4 SER implementation, because launching the Model 4 SER using an outdated platform does not further the Department's objectives, nor provide a long-term compliance solution.

Again, the upgrade project includes configuring, testing, and implementing the Department's SER program within the new software platform and schema. Successful completion of that upgrade should allow Model 4 sellers to file SERs sometime in 2014.

Report Comment: Indiana was declared out of compliance in 2011 because it exempts blood glucose meters with or without a prescription from the sales tax but does not exempt all durable medical equipment unless sold with a prescription.

Response: The Department asserts that Indiana amended the language in IC 6-2.5-5-18 in 2013 to remove the "blood glucose meters" exemption from that statute; Indiana removed section (e) completely from IC 6-2.5-5-18. The Department further asserts that, under the SSUTA, Indiana "may enact a product-based exemption without restriction if Part II of the Library of Definitions does not have a definition for such product." SSUTA, Section 316(B)(1). SSUTA's Library of Definitions does not include "diabetic supplies" nor "blood glucose monitoring supplies." IC 6-2.5-5-19.5 not only defines "blood glucose monitoring supplies," but also provides an exemption for the entire product, in accordance with Section 316. Indiana asserts that "blood glucose monitoring supplies" do not fit within the definition of "durable medical equipment" because such items cannot withstand repeated use.

Report Comment: The citation given does not address the due date for payments if the Federal Reserve Bank is closed. Is this provision documented elsewhere?

Response: Indiana will add the following to the "Comment" section of the Certificate of Compliance: "The term 'a national legal holiday recognized by the federal government' in IC 6-8.1-6-2 includes a day that the Federal Reserve Bank is closed."

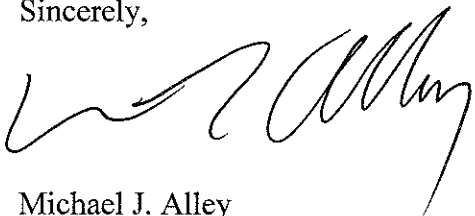
BAC Report Comment: The Indiana Department of State Revenue has issued rulings, e.g., Revenue Ruling #2009-03 ST (released 4/29/2009), taking the position that prewritten software that is licensed for use and available from a remote server is taxable. Indiana's attempt to tax access to prewritten software (and any associated hardware) from a customer merely accessing

the prewritten software that is not delivered (i.e., downloaded) to the customer as a sale of “tangible personal property” is not compliant with the SSUTA. While the definition of “tangible personal property” specifically includes “prewritten software,” § 333 of the SSUTA excludes computer software, which prewritten software is a component of, from the term “products transferred electronically.” This is an important distinction because, as pointed out in Rule 332.2.B.4, the term “transferred electronically” is broader than the term “delivered electronically” that is used in computer related definitions. That rule specifies that just accessing a product can be considered something “transferred electronically;” however, this provision cannot apply to prewritten software because § 333 of the SSUTA excludes it from being a product “transferred electronically.” It also, logically, does not fit in as tangible personal property based on the SSUTA sourcing provisions for tangible personal property. When prewritten software is only accessed by a purchaser, there is no “[t]asking possession of the tangible personal property” as specified § 311.A of the SSUTA (defining when something is “received”). Further, if it is found that Indiana can tax access to prewritten software based on it being “transferred electronically,” the requirements in § 332.D of the SSUTA must be met. Absent Indiana having a law (i.e., statute), the tax on such software only reaches transactions where the purchaser: 1) has a right of permanent use, 2) has no obligation to make continued payments and 3) is an end user. Accordingly, while Indiana may choose to tax access to prewritten software by specifically imposing a tax on the sale of such product, Indiana cannot do it via the SSUTA’s definition of tangible personal property and remain compliant with the SSUTA.

Response: While the Department of Revenue recognizes BAC concerns, the Department re-asserts that its sales and use tax treatment of remote access to prewritten computer software remains in compliance with SSUTA. The Department also recognizes and respects the Remote Access to Prewritten Computer Software Workgroup’s continuing activities and information collection specifically devoted to addressing remote access to prewritten computer software. That workgroup maintains its reliance on the conclusion reported to the Governing Board at the September 2012 meetings in Salt Lake City, which stated that “[t]he SSUTA allows States to tax remote access to pre-written computer software by taxing it as a sale or use of tangible personal property.”

If you have any further questions, please do not hesitate to contact Larry Molnar at (317) 233-0656.

Sincerely,



Michael J. Alley
Commissioner